

Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

Explanatory Notes

Short title

The short title of the Bill is the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019.

Policy objectives and the reasons for them

The policy objective of the Bill is to improve the responsiveness of the criminal justice system to child sexual offending and the victims of child sexual offences by amending a range of legislation to:

- implement recommendations of the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission);
- implement recommendations of the Queensland Sentencing Advisory Council's (QSAC) report on the Classification of child exploitation material for sentencing purposes (CEM Report); and
- create new offences criminalising the possession, production and supply of anatomically correct, life-like child replicas used for sexual gratification and some other minor and technical amendments.

Royal Commission - Criminal Justice Report

The establishment of the Royal Commission was announced in 2012 in response to allegations of sexual abuse of children in institutional contexts that had been emerging in Australia for many years.

Over a five year period the Royal Commission undertook a significant inquiry into institutions' responses to child sexual abuse and made a total of 409 recommendations across various reports.

The Criminal Justice Report was released in August 2017, prior to the Royal Commission's Final Report in December 2017, and contains 85 recommendations aimed at reforming the Australian criminal justice system to provide fairer and more effective responses to victims of child sexual abuse, including institutional child sexual abuse.

On 15 June 2018, the Queensland Government tabled a response to all of the Royal Commission's recommendations, accepting or supporting in principle more than 240 of the recommendations, including some recommendations in the Criminal Justice Report. The Government also accepted the Royal Commission's recommendation to provide annual reports for five years, commencing 12 months after the Royal

Commission presented its final report to governments. The Queensland Government's First Annual Progress report was tabled in Parliament on 19 December 2018.

Following further analysis and consultation, the Bill contains amendments to implement a range of key recommendations in the Criminal Justice Report in Queensland relating to:

- persistent child sexual abuse offences (recommendation 21);
- grooming offences (recommendation 26);
- limitation periods and immunities (recommendation 30);
- third-party offences (recommendations 33-36);
- reforming particular judicial directions (recommendation 65);
- excluding good character as a mitigating factor (recommendation 74);
- sentencing standards in historical cases (recommendation 76); and
- intermediaries (recommendations 59 and 60).

Queensland Sentencing Advisory Council – CEM Report

The Queensland Sentencing Advisory Council (QSAC) published its CEM Report in July 2017. That QSAC was tasked with considering the classification of Child Exploitation Material (CEM) for sentencing purposes was a result of recommendation 4.11 of the Queensland Organised Crime Commission of Inquiry report dated 30 October 2015. QSAC made 16 recommendations comprised of legislative reform and changes to operational practice.

Among other matters, QSAC's Terms of Reference dated 22 November 2016 asked that QSAC consider sentencing guidelines set out in section 9(7) of the *Penalties and Sentences Act 1992* (PSA) and consider whether any further factors should be added.

Recommendation 1 of the CEM Report recommended three amendments to section 9(7) of the PSA. The Bill implements these recommendations. The amendments will:

- ensure that the PSA uses language reflective of the broad types of material which may be covered by CEM related offences in the Criminal Code and similar offences in other Queensland statutes; and
- insert further guidelines into section 9(7) of the PSA in relation to an offender's conduct or behaviour and any relationship between an offender and a child.

The Bill will also give effect to recommendation 3 of the CEM Report to support the provision of reports tendered during sentencing proceedings to Queensland Corrective Services. This will enhance rehabilitative efforts by ensuring the timely delivery of expert reports to Queensland Corrective Services which may then further inform offender program and treatment delivery.

Child abuse object offences

The March 2019 Australian Institute of Criminology paper '*Exploring the Implications of Child Sex Dolls*'¹ (the AIC report), noted that between July 2013 and June 2018, 133 life-like child replicas were identified being imported into Australia. Some of these life-like child replicas have been found in Queensland.

Life-like child replicas of children designed to be used for sexual gratification often possess anatomical features associated with children of varying ages, and in some cases may clearly resemble very young children. Common features include a skin-like covering over a frame which permits the object to be manipulated into a variety of positions with the presence of orifices and other features designed for sexual gratification.

The use of a life-like child replica in a sexual manner presents potential harms to the Queensland community and the children of Queensland. The AIC report notes that the potential for harm exists in their use leading to: escalation in offending behaviours; normalising the sexual abuse of children; the sexual objectification and commodification of children; and, their use in grooming of potential child victims.

Achievement of policy objectives

Royal Commission - Criminal Justice Report

The Bill implements key recommendations of the Criminal Justice Report by amending:

- the Criminal Code to:
 - provide for retrospective application of the offence in section 229B (Maintaining a sexual relationship with a child);
 - extend the grooming offence in section 218B (Grooming children under 16) to certain persons other than the child;
 - provide for retrospective application of the removal of limitation periods on prosecutions for certain child sexual offences;
 - create a new offence of failure to report belief of child sexual offence that requires all adults to report child sexual abuse to police;
 - create a new offence of failure to protect a child from child sexual offence that applies in an institutional context;
 - ensure that the new failure to report and protect offences apply to information or knowledge gained during, or in connection with, a religious confession;
- the PSA to:
 - exclude good character as a mitigating factor at sentence where that good character facilitated the child sexual offending;
 - provide that when sentencing offenders for historical child sexual offences the court is to sentence offenders in accordance with sentencing standards at the time the sentence is imposed, rather than at the time of the offending;

¹ (Brown R & Shelling J), 2019 Trends & issues in crime and criminal justice no. 570. Canberra: Australian Institute of Criminology
<https://www.aic.gov.au/publications/tandi/tandi570>

- the *Evidence Act 1977* to:
 - modify jury directions and warnings in relation to delay and forensic disadvantage; and
 - support establishment of a pilot intermediary scheme.

Providing retrospective application of the offence of maintaining a sexual relationship with a child under 16

In recommendation 21, the Royal Commission set out the preferred criteria for a persistent child sexual abuse offence. The criteria largely mirrors the existing Queensland Criminal Code offence in section 229B (Maintaining a sexual relationship with a child) (maintaining offence). However, the Royal Commission's recommended criteria included giving the offence retrospective effect.

Consistent with the Royal Commission's recommendation, the Bill amends the Criminal Code to make the offence in section 229B retrospective.

Retrospective operation of the maintaining offence will have the effect of altering the way in which unlawful sexual conduct toward a child is relied upon by making the 'relationship' an offence. The offence also does not require the jury to unanimously agree as to the commission of particular sexual acts, so long as they are unanimously satisfied beyond a reasonable doubt, that the evidence establishes an unlawful sexual relationship. Additionally, the unlawful sexual acts do not have to be particularised to the same extent as would be required to establish an individual offence.

Extending the grooming offence to persons other than a child

Recommendation 26 of the Criminal Justice Report is that each jurisdiction extend their broad grooming offence to capture grooming of persons other than the child which is intended to facilitate sexual access to that child. This recommendation was informed by submissions to the Royal Commission from victims' family members who expressed that they themselves had been 'groomed' by a perpetrator to the extent that they came to trust that person and encouraged their child to spend time with them, only later to discover that they had abused the child.

The current offence in section 218B (Grooming children under 16) of the Criminal Code applies only to conduct 'in relation to a person under the age of 16 years with an unlawful intention to commit sexual offending'.

The Bill implements recommendation 26 by amending section 218B of the Criminal Code to provide that grooming includes conduct directed toward a person who has the care of a child under the age of 16 years. The offence defines a *person who has care of a child* to include a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

This approach ensures that a child under 16 years of age remains the focus of the offence while acknowledging the full range of manipulative measures employed by an offender to gain access to a child with a view to sexual abuse.

In recommending a broader grooming offence, the Royal Commission did not anticipate that it would be charged often, particularly not in the absence of contact

offences. This is because the amendment requires proof of the unlawful intention accompanying the conduct relied upon. This requirement ensures that innocent behaviour toward someone other than the child is not captured by the offence.

Provide for retrospective application of the removal of limitation periods and immunities on prosecutions for certain child sexual offences

In recommendation 30 of the Criminal Justice Report, the Royal Commission proposes removal of any remaining limitation periods or immunities that may act as an obstacle to justice for historical child sex abuse survivors. While it is not expressed in the wording of the recommendation, the Royal Commission states in the Criminal Justice Report (refer to page 45 of the Executive Summary) that the removal of limitation periods should have retrospective effect.

While there are no limitation periods that apply currently to child sexual offences in Queensland, there is potential for the application of now repealed limitation periods to apply to historic offending. Sections 212 (Defilement of girls under twelve), now repealed, and section 215 (Defilement of girls under seventeen and of idiots) of the Criminal Code that existed prior to 30 March 1989, applied a limitation period of six months within which a prosecution could be commenced. The repeal of this limitation period was prospective which means that any immunity already arising in relation to offending prior to 30 March 1989, would continue.

To implement recommendation 30, the Bill gives retrospective effect to the amendments made in 1989 by removing the limitation period in the relevant sections of the Criminal Code. This will ensure that victims are not prevented from seeking justice for pre-1989 offending.

Creation of new third party offences of failure to report belief of child sexual offence committed in relation to a child and failure to protect child from child sexual offence

Recommendations 33-35 of the Criminal Justice Report are for each state and territory government to introduce legislation to create a criminal offence of failure to report, targeted at child sexual abuse in an institutional context which specifically addresses religious confessions, including by applying to information disclosed in, or in connection with, a religious confession and excluding any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective. Recommendation 36 provides for the introduction of legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution.

The Bill amends the Criminal Code to create a new offence of failure to report belief of child sexual offence committed in relation to a child mandating that all adults (18 years and over), unless they have a reasonable excuse, report to police child sex abuse of children under 16 or a child (under 18 years) with an impairment of the mind. The information gained by the adult must cause the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being, or has been, committed against the child.

Liability under the offence is subject to the absence of a reasonable excuse. Without limiting the scope of what constitutes a reasonable excuse, a number of specific reasonable excuses are set out within the provision. Consistent with recommendation 34 of the Criminal Justice Report this includes where a person has already reported the information, or reasonably believes that another person will report the information under existing reporting requirements of the *Child Protection Act 1999*, the *Education (General Provisions) Act 2006* or the *Youth Justice Act 1992*.

A ‘child sexual offence’ is defined as an offence of a sexual nature which is committed in relation to a child, including offences under Chapter 22 (Offences against morality) of the Criminal Code, such as offences relating to the making, distribution and possession of child exploitation material, and Chapter 32 (Rape and sexual assaults) of the Criminal Code.

The new reporting offence will apply to information received on or after commencement, even if that information relates to abuse that occurred before commencement.

The reporting offence provision also makes it clear that a person who in good faith discloses information in accordance with the provision, is protected from liability of a civil or criminal nature or pursuant to an administrative procedure for the making of that disclosure.

A maximum penalty of three years imprisonment will apply to the new failure to report offence.

The Bill amends the Criminal Code to provide for a new offence of failure to protect child from child sexual offence. The failure to protect offence will apply to an ‘*accountable person*’ (i.e. an adult 18 years or over who is associated with an institution, other than a regulated volunteer).

Under the failure to protect offence, an ‘*accountable person*’ will be liable where the person:

- knows there is a significant risk that another adult (who is associated with an institution or is a regulated volunteer) will commit a child sex offence; and
- has the power or responsibility to reduce or remove the risk; and
- wilfully or negligently fails to reduce or remove the risk.

The failure to protect offence will apply to a child that is under the care, supervision or control of an institution and the child is either:

- under 16 years, or
- 16 or 17 years of age with an impairment of the mind.

A maximum penalty of five years imprisonment will apply to the new failure to protect offence.

The definition of ‘child sexual offence’ does not extend to offences committed outside Queensland. However, sections 12, 13, and 14 of the Criminal Code apply Queensland criminal law (which will include the new failure to report and protect offences in the Bill) to acts or omissions, and persons, outside Queensland if the preconditions

expressed in the sections that connect the acts or omissions, and persons, to Queensland are met.

While there is no statutory evidential privilege applying in Queensland, an express provision is included in the Bill to clarify the new third party offences apply to any information or knowledge gained during, or in connection with, a religious confession. The offences do not override any other privilege, including the privilege against self-incrimination or legal professional privilege.

Ensuring that offenders who have used their good character to facilitate offending cannot rely on previous good character as a mitigating factor on sentence where this has facilitated the offending

Recommendation 74 of the Criminal Justice Report is that legislation provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending.

The PSA provides the legislative framework for sentencing in Queensland. Currently, there is no legislative exclusion for consideration of good character at sentence where that good character facilitated the offending.

The Bill amends section 9 of the PSA to prohibit reliance on character as a mitigating factor where that character facilitated the offending, when sentencing an offender for a child sexual offence, including child exploitation and similar offences.

Ensuring that offenders convicted of historical abuse are sentenced in keeping with contemporary sentencing standards

The Royal Commission noted that applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. As sentences for child sexual abuse offences have increased over time, the imposition of historical sentencing standards can mean shorter sentences are imposed than would have been under contemporary standards. This can be distressing for victims and may undermine community confidence in the administration of justice. Recommendation 76 therefore provides for child sexual offenders to be sentenced according to the sentencing standards at the time of sentence (whether in legislation or by way of guidance in other decisions), rather than those that existed at the time of the offence.

In Queensland, in sentencing an offender for any offence of a sexual nature committed against a child under 16 years, the sentencing guidelines contained in section 9(4) of the PSA apply. These guidelines include that the offender must serve an actual term of imprisonment, unless there are exceptional circumstances. Similarly for child exploitation and related offences, the principles in section 9(7) apply.

The Bill amends the PSA to clarify that child sexual offenders are sentenced according to the sentencing standards at the time of sentence, rather than those that existed at the time of the offence. However, for reasons of procedural fairness and natural justice, and in accordance with the Royal Commission's recommendation, the amendments are not intended to affect the maximum penalty applying at the time the offence was committed.

Reform jury directions on delay and forensic disadvantage

The Royal Commission acknowledged that the purpose of jury directions is to ensure a fair trial for the accused and to avoid miscarriages of justice. However, it observed that some of the directions traditionally given to juries in child sexual abuse cases are founded upon flawed presumptions about victims, including an assumption that a genuine victim will complain at the first reasonable opportunity.

Recommendation 65 requires jurisdictions to review and, if necessary, appropriately reform legislation to restrict the giving of particular common law directions and warnings and that provisions in New South Wales and Victoria provide precedents for consideration. In 2009, the Queensland Law Reform Commission (QLRC) in its report *A Review of Jury Directions* (the QLRC Report) made some similar recommendations for reform to jury directions in sexual offence cases.

Consistent with recommendation 65, the Bill contains amendments relating to the Longman Direction which concerns the impacts on an accused person as a result of the delay in a complaint. The Bill inserts new section 132BA into the *Evidence Act 1977* to provide that in a criminal proceeding if a judge, on the judge's own initiative or on the application of a party, is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence (including a delay in reporting the offence), the judge must inform the jury of the nature of the disadvantage and the need to take the disadvantage into account when considering the evidence. However, a significant forensic disadvantage is not established by the mere fact of delay alone. In complying with section 132BA, the judge must not warn or suggest to the jury that it would be "dangerous or unsafe to convict" or "the complainant's evidence should be scrutinised with great care". However, the judge need not give the direction if there are good reasons for not doing so.

The QLRC Report provides at paragraph 15.57 (page 487) that:

The warning that should be given when any parties have suffered any forensic disadvantage beyond their control should inform the jury of the nature of that disadvantage in specific terms and its impact on the affected party, and that the jury should, therefore, take this into account when assessing the evidence as a whole. Accordingly, the Commission recommends that these loaded expressions not be used in any amended Longman direction given to juries.

Creation of an intermediary scheme

Recommendations 59 and 60 of the Criminal Justice Report relate to the establishment of an intermediary scheme to mitigate the difficulties that witnesses of child sexual abuse may experience in participating in the court process and in giving evidence. The amendments in the Bill support introduction of a pilot intermediary scheme at all levels of courts in locations to be prescribed by regulation. The aim of the intermediary scheme pilot is to ensure better quality evidence for police and courts to assess child sexual abuse cases and to reduce the stress experienced by these witnesses in such proceedings.

Intermediaries are professionals who are typically speech pathologists, occupational therapists, psychologists, and social workers. Some other jurisdictions have also used teachers and nurses according to need.

Intermediaries will provide communication support to prosecution witnesses in child sexual offence prosecutions who are children under 16 years, persons with an impairment of the mind, persons who have difficulty communicating or persons of a class prescribed by regulation.

Intermediaries will be appointed as officers of the court to:

- assess witness communication and describe any specific communication assistance required;
- provide practical strategies on how to best communicate with the witness and how to pose a question to get the most reliable evidence;
- inform ‘ground rules’ hearings, where applicable, to establish court communication guidelines for the witness; and
- write court reports on the witness’s communication needs.

Queensland Sentencing Advisory Council CEM Report

The Bill implements recommendations 1 and 3 of the CEM Report by amending the PSA to:

- ensure that the PSA uses language which covers the broad types of material which may be covered by CEM related offences in the Criminal Code and similar offences in other Queensland statutes;
- include additional sentencing guidelines requiring judicial consideration of:
 - an offender’s conduct or behaviour in relation to CEM and child abuse objects when sentencing an offender for CEM offences; and
 - any relationship between an offender and a victim child when sentencing an offender for CEM offences; and
- establish a statutory power for a court to order that a report tendered at sentence be provided to Queensland Corrective Services.

Ensuring consistent use of language across the PSA and CEM related offences of the Criminal Code and other Queensland statutes

Recommendation 1 of the CEM Report identified an inconsistency between the broad definition of ‘*material*’ in the Criminal Code and section 9(7)(a) of the PSA which requires a court to give primary regard, amongst other things, to ‘the nature of any *image* of a child that the offence involved...’.

The reference to ‘image’ in section 9(7)(a) of the PSA is inconsistent with the broad definition of ‘material’ in section 207A of the Criminal Code which includes anything that contains data from which text, images or sound can be generated. Additionally, it is not entirely compatible with the types of material made unlawful by provisions of the *Classification of Computer Games and Images Act 1995*, the *Classification of Films Act 1991* and the *Classification of Publications Act 1991*.

The Bill will correct this inconsistency by inserting into section 9(7) of the PSA provisions which require a court to consider the nature of (i) any material describing or

depicting a child; or (ii) any doll, robot or other object representing or portraying a child. The latter is required in order to apply this same sentencing guideline to the new child abuse object offences which are created by the Bill.

Additional sentencing guidelines requiring judicial consideration of an offender's conduct or behaviour in relation to CEM and child abuse objects when sentencing an offender for CEM offences

Recommendation 1 of the CEM Report also identified that an examination of a CEM offender's role in relation to seized CEM may yield important information which could assist a court to assess an offender's risk to the community.

The Bill gives effect to this part of recommendation 1 of the CEM Report by inserting section 9(7)(ab) into the PSA which requires a court to consider an offender's conduct or behaviour in relation to the CEM or child abuse object the subject of the offence.

It is not possible to exhaustively state the matters which may fall for consideration under this provision. However, some matters which may be relevant under this provision include:

- search terms or platforms used to obtain CEM or child abuse object;
- the planning involved in obtaining CEM or child abuse object;
- the duration and frequency of access to CEM;
- how the offender came to the attention of law enforcement;
- how any CEM was stored or manipulated or shared across devices;
- whether there is any evidence of further dealings with the CEM or child abuse object; and
- whether any apparent focus is evident including a focus on a particular age group, activity or type of material.

Additional sentencing guidelines requiring judicial consideration of any relationship between an offender and a victim child when sentencing an offender for CEM offences and sexual offences committed against a child

Recommendation 1 of the CEM Report further recommended that sections 9(6) and 9(7) of the PSA be amended to include a requirement that the relationship between an offender and a child be included as a sentencing guideline applicable to CEM offences and offences of a sexual nature committed against a child under the age of 16 years. The Bill amends sections 9(6) and 9(7) of the PSA to implement this recommendation.

Establishing a statutory power for a court to order that a report tendered at sentence be provided to Queensland Corrective Services or Department of Youth Justice

The Bill amends the PSA to provide a statutory basis for a sentencing court to order that a medical or other report tendered at sentence be provided to Queensland Corrective Services. Under this provision, a court will be able to make orders that will facilitate the timely provision of such a report.

Amendments are also made to the *Youth Justice Act 1992* (YJA) to provide courts imposing sentences under the YJA with the same power to order medical or other reports tendered at sentence be provided to the Department of Youth Justice.

Child abuse object offences

The Bill implements the policy objective by amending the Criminal Code to create two new offences which criminalise the production, supply and possession of child abuse objects.

The Bill inserts a definition of ‘*child abuse object*’ into section 207A of the Criminal Code. The definition is intended to capture dolls, robots or other objects a reasonable adult (i.e. an objective test) would consider as being representative of or portraying a child, or part of a child, under the age of 16 years. This part of the definition may also be satisfied if a reasonable adult (i.e. an objective test) would consider a doll, robot or other object gives the predominant impression that it is a representation or portrayal of a child under the age of 16 years despite the presence of adult-like anatomical features.

Additionally, the definition requires that a reasonable adult (i.e. an objective test) would consider that the doll, robot or other object be intended for use in an indecent or sexual context or has been used in an indecent or sexual context.

The Bill inserts new sections 228I and 228J into the Criminal Code which provide for the offences of producing or supplying a child abuse object and possessing a child abuse object. These offences are designated a crime and are intended to be dealt with only on indictment. The maximum penalty available for these offences is 14 years imprisonment which, for the offences under section 228I, is increased to 20 years where the production or supply is for a commercial purpose.

The Bill provides for the serious organised crime circumstance of aggravation at section 161Q of the PSA to apply to these new offences.

Existing sections 228G (Forfeiture of child exploitation material etc.) and 228H (Possession etc. of child exploitation material by law enforcement officer) of the Criminal Code are both amended to include the child abuse object offences.

New section 228K of the Criminal Code provides for specific defences applicable to the offences under the new sections 228I and 228J of the Criminal Code. The provisions provide that it will be a defence if a person can prove that that they engaged in the prohibited conduct for a genuine artistic, educational, legal, medical or public benefit purpose and the conduct was in the circumstances reasonable for that purpose. Similar defences are available for other CEM offences in the Criminal Code.

Other amendments

The Bill also amends the Criminal Code to vest the Director of Public Prosecutions with a limited right of interlocutory appeal (i.e. judgments or orders made by the trial judge before or during trial) alongside the existing limited appeal rights of the Attorney-General.

The Bill also makes an amendment to the *Police Powers and Responsibilities Act 2000* to enable a police officer to seize an employment-screening document of a person who has been charged with a serious offence as prescribed under the *Working with Children (Risk Management and Screening) Act 2000*. This amendment complements recent amendments to the *Working with Children (Risk Management and Screening) Act 2000*

that provide for automatic suspension of a blue card if the blue cardholder is charged with a serious offence.

Alternative ways of achieving policy objectives

Many of the policy objectives are underpinned by the findings in the Royal Commission's Criminal Justice Report. There is no alternative way of implementing the relevant recommendations other than through legislative reform.

Implementation of recommendations 1 and 3 of the CEM Report require legislative action.

The creation of offences in the Criminal Code relating to child abuse objects can only be achieved through legislative reform.

Estimated cost for government implementation

The Queensland Government has provided additional funding for the Department of Justice and Attorney-General and Queensland Police Service to respond to recommendations from the Royal Commission's Criminal Justice Report. This funding has been allocated to the implementation of key recommendations to improve the criminal justice system's response for victims and survivors of child sexual abuse, including improvement of prosecution and police responses to vulnerable people and the establishment of a pilot intermediary scheme in Queensland.

Other amendments in the Bill may have some cost implications for Government, including amendments to the Criminal Code relating to:

- the retrospective application of the offence of maintaining a sexual relationship with a child;
- the retrospective application of the removal of the six month limitation period for certain child sexual offence prosecutions;
- expansion of the offence of grooming children under 16;
- new child exploitation offences under new sections 228I – 228K; and
- new failure to report and failure to protect offences.

Such costs will be funded through the existing agency resources.

Consistency with fundamental legislative principles

Breaches of fundamental legislative principles raised by the amendments are addressed below.

Whether legislation has sufficient regard to rights and liberties of individuals (Legislative Standards Act 1992, section 4(2)(a))

Clause 25 - Creation of new offences of failure to protect child from child sexual offence and failure to report belief of child sexual offence committed in relation to child

Clause 25 of the Bill amends the Criminal Code to impose positive obligations on third parties by creating offences of failure to report belief of child sexual offence committed

in relation to child and failure to protect child from child sexual offence. These new offences provide for maximum penalties of three years imprisonment and five years imprisonment respectively.

The new offences criminalise conduct, carrying significant maximum penalties that are not currently the subject of criminal sanction. This impacts on the rights and liberties of individuals, however this must be weighed against the need to protect the most vulnerable members of our community from child sexual abuse and accordingly any breach of fundamental legislative principles is considered justified.

Clause 13 - Extending the offence of grooming children under 16

Clause 13 of the Bill extends the application of the offence of grooming children under 16 years to conduct directed toward a person who has care of a child (not just conduct directed toward the child).

The effect of this expansion of the offence upon individuals' rights and liberties must be weighed against the need to ensure that legislation can adequately acknowledge and punish the full range of manipulative measures employed by offenders in attempting to gain access to a child with a view to sexual abuse. Relevantly, the conduct will only be captured under the offence if it is accompanied by a requisite unlawful intention to sexually abuse the child.

Clause 16 – Creation of child abuse object offences in the Criminal Code

The Bill creates offences in the Criminal Code which makes the production, supply or possession of child abuse objects unlawful. It also provides for a defence to apply to these offences in addition to other defences available under the Criminal Code.

The creation of these offences is justified on the basis that the use of a child abuse object poses potential risks to the Queensland community and Queensland children.

To the extent that the rights and liberties of an individual may be curtailed by the introduction of these offences, that curtailment is justified on grounds relating to ensuring the safety of children and the community.

Clause 44 – Criminal history screening provided for under new section 21AZX of the Evidence Act 1977

The Bill provides that the chief executive may ask the police commissioner for a person's criminal history (including a brief description of the circumstances of a conviction mentioned in the criminal history) for deciding the suitability of a person to perform the functions of an intermediary under new section 21AZV (Chief executive to establish intermediaries panel) or 21AZW (Removal of person from intermediaries panel). However, the chief executive may make the request only if the person has given the chief executive written consent for the request.

These provisions may be considered a departure from the fundamental legislative principle that requires legislation to have sufficient regard to the rights and liberties of individuals by infringing a person's right to privacy. However, they are considered

justifiable having regard to the functions that an intermediary performs and are necessary to promote and protect the rights, interests and wellbeing of witnesses. Any potential breach is also balanced against the safeguards provided in the Bill which provide for the confidentiality of criminal history information, including a requirement for the chief executive to destroy the criminal history report as soon as practicable after it is no longer needed.

Clause 44 - Creation of new offence in new section 21AZY of the *Evidence Act 1977* of disclosing criminal history

New section 21AZY(2) contains an offence relating to disclosure of criminal history information which carries a maximum penalty of 100 penalty units. This new offence and the maximum penalty are considered justified on the basis that inappropriate disclosure of criminal history information would be likely to adversely impact the rights and privacy of affected intermediaries and prospective intermediaries. The offence will ensure the criminal history information necessary for the intermediary scheme is stored and dealt with appropriately. The maximum penalty is consistent with a range of similar existing offences in Queensland.

Clause 53 – Amendments to section 9 of the PSA

The Bill proposes amendments to section 9 of the PSA to provide additional guidelines to which a court is to have primary regard when sentencing offenders for CEM, CEM related offences and offences of a sexual nature committed against children under the age of 16 years.

Any effect that these amendments will have on the rights and liberties of an individual must be considered in the context of their purpose as guiding sentencing decisions which arise as a result of a criminal conviction. As these amendments are to apply to offenders who have, to varying degrees, engaged in conduct against or in relation to children, any infringement of rights or liberties can be justified on that basis.

Clause 39 – Jury directions for delay in prosecuting offence

Clause 39 modifies jury directions and warnings in relation to delay and forensic disadvantage. Section 132BA prohibits a judge from warning or suggesting to the jury that it would be “dangerous or unsafe to convict” or “the complainant’s evidence should be scrutinised with great care”. The insertion of new section 132BA of the *Evidence Act 1977* impacts on a judge’s discretion to comment on the evidence which may affect the judge’s ability to ensure that the trial is fair.

The Royal Commission acknowledged that the purpose of jury directions is to ensure a fair trial for the accused and to avoid miscarriages of justice. However, it observed that some of the directions traditionally given to juries in child sexual abuse cases are founded upon flawed presumptions about victims, including an assumption that a genuine victim will complain at the first reasonable opportunity.

Any breach of fundamental legislative principles is considered justified having regard to the Royal Commission’s recommendations.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, the legislation:

- ***does not reverse the onus of proof in criminal proceedings without adequate justification - Legislative Standards Act 1992, section 4(3)(d);***
- ***does not adversely affect rights and liberties, or impose obligations, retrospectively - Legislative Standards Act 1992, section 4(3)(g); and***
- ***is consistent with principles of natural justice - Legislative Standards Act 1992, section 4(3)(b); and***
- ***provides for the compulsory acquisition of property only with fair compensation - Legislative Standards Act 1992, section 4(3)(i).***

Clause 14 - Amendment of section 228G of the Criminal Code

Clause 14 of the Bill amends section 228G of the Criminal Code to permit a court to make an order forfeiting a child abuse object irrespective of whether a proceeding in relation to it results in a conviction. This will cover a situation where a prosecution is undertaken in respect of an object which meets the definition of a child abuse object but, for other reasons, the prosecution does not result in conviction. An example might be that the element of possession is not made out.

There may be circumstances under which the exercise of this power may constitute a breach of fundamental legislative principles in that a person may be deprived of their property. However, as the Bill criminalises the possession of child abuse objects, any interference with the person's property is justified on that basis.

Clause 16 – Reversal of onus in defence provided for under new section 228K of the Criminal Code

Clause 16 of the Bill creates offences which prohibit the production, supply or possession of child abuse objects in new sections 228I and 228J of the Criminal Code.

It also creates a defence in new section 228K of the Criminal Code which applies where the accused person (i) has engaged in conduct alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose; and (ii) the person's conduct was, in the circumstances, reasonable for that purpose. An accused person bears the onus to prove the matters to establish the defence.

The purposes for which an accused person may be engaged in conduct constituting an offence are broadly drafted. They cover a variety of human activities including ones which might arise in a professional capacity. The defence also requires that the purposes be genuine and that the conduct is reasonable, in the circumstances, for that purpose.

The reversal of the onus is justified on the basis that matters supporting the defence would be peculiarly within an accused person's knowledge, particularly those matters which would inform consideration of whether a purpose was a genuine one and also a consideration of the reasonableness of the conduct against that genuine purpose.

Clause 25 - Reversal of onus provided for under new section 229BC (Failure to report belief of child sexual offence committed in relation to child) of the Criminal Code

The effect of the reasonable excuse provision in the new section 229BC (Failure to report belief of child sexual offence committed in relation to child) is to reverse the onus of proof to the defendant.

The offence anticipates that information that would ground a reasonable belief that a sexual offence has occurred and triggers the obligation to report, will often be gained in clandestine circumstances. This unique aspect of the offence means that there are likely to be a range of matters that are peculiarly within the knowledge of the accused person. In these circumstances the defendant would be in a better position than the prosecution to meet the evidential burden. The 'reasonable excuse' provision is included to ensure liability for the failure to report offence would not be unjustly imposed given the complexity and unpredictability of the situations likely to arise.

Clause 21 - Retrospective application for section 229B (Maintaining a sexual relationship with a child) of the Criminal Code

Non-retrospectivity of statutes extending the criminal law is a fundamental right. This position is reflected in section 11 of the Criminal Code and section 20C of the *Acts Interpretation Act 1954*.

The amendments in Clause 21 of the Bill to make the offence in section 229B (Maintaining a sexual relationship with a child) of the Criminal Code retrospective is a breach of fundamental legislative principles.

The Bill amends the Criminal Code to retrospectively apply the offence in section 229B to unlawful sexual acts committed prior to the inception of the offence in 1989, including the maximum penalties that applied at that time.

The Bill also amend the Criminal Code to apply the offence in section 229B to unlawful sexual acts committed post 1989, except the maximum penalty and applied those maximum penalties in place at the time the offence was committed.

This approach recognises that persistent sexual abuse of children commonly results in the child being unable to distinguish between particular episodes of abuse, especially if the conduct is the same or similar on all occasions and reflects the delays in reporting associated with child sexual abuse. Retrospective application of the maintaining offence ensures a consistency across all time periods and appropriately affords victims of historic abuse the same access to justice as all other victims of persistent child sexual abuse.

Clause 21 - Retrospective removal of the immunity against prosecution

The amendments in Clause 21 of the Bill to retrospectively apply amendments that removed the limitation periods applying to sections 212 and 215 of the Criminal Code breach fundamental legislative principles. The amendments are considered justified in that they enable potential survivors of historical child sexual abuse to access justice and ensures that justice is seen to be done by the broader community. Additionally, this breach is mitigated by the safeguard available to the defendant through making a stay

application to protect against any abuse of process or in circumstances where they cannot receive a fair trial.

It is impossible to predict the number of prosecutions that might flow from this proposal but it is anticipated that this amendment will have limited application and will not necessarily equate to a significant increase in previously barred prosecutions. As noted by the Royal Commission, there are a number of competing factors that prevent the prosecution of older offences associated with the passage of time including the deterioration of evidence and the death of perpetrators.

Clause 28 - Retrospective application of new section 229BC (Failure to report belief of child sexual offence committed in relation to child) of the Criminal Code

Clause 28 contains a transitional provision relevant to new section 229BC inserted by clause 25 of the Bill. While the failure to report offence mandates reporting information gained on or after commencement, new section 751 of the Criminal Code provides that this information may relate to offending that is reasonably believed to have occurred prior to commencement. In this regard the failure to report offence has a partial retrospective application. This partial retrospective application of the offence is justified when balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. Given children are generally unequipped to protect themselves from such predation, it is incumbent on the community to take steps to provide adequate protection from harm to these children by ensuring that offenders are identified and brought to justice.

Clause 53 – Excluding good character as a mitigating factor

Clause 53 which amends section 9 (Sentencing guidelines) of the PSA to exclude good character as a mitigating factor at sentence where that good character facilitated the child sexual offending is inconsistent with the principles of natural justice.

This breach of fundamental legislative principles is justified to prevent offenders from benefiting from their previous good character where those factors assisted the offender to commit a child sexual offence. Preventing offenders relying on good character in this way reforms sentencing practice to align with contemporary community standards and affords justice and dignity to victims rather than rewarding offenders for a factor enabling their offending behaviour.

Clause 53 - Historical standards in sentencing

Clause 53 which amends section 9 (Sentencing guidelines) to require defendants in child sexual abuse and child exploitation prosecutions to be sentenced in accordance with sentencing standards at the time the sentence is imposed (rather than the time of offending) is inconsistent with principles of natural justice.

This breach of fundamental legislative principles is justified given that the amendment is intended to better reflect the contemporary community attitude toward this type of offending through the imposition of current sentencing standards. Additionally, to mitigate impacts on procedural fairness and natural justice, the amendments do not affect the maximum penalty applying at the time the offence was committed.

Whether legislation has sufficient regard to the institution of Parliament (Legislative Standards Act 1992, section 4(4))

Clause 44 – Provision for a class of witness to be prescribed by regulation in new section 21AZL

Section 21AZL provides for the appointment of an intermediary for certain prosecution witnesses, including a witness of a class prescribed by regulation. This provision may breach the fundamental legislative principle of having sufficient regard to the institution of Parliament. However, any breach is justified given that the Bill supports the establishment of a limited pilot intermediary scheme. During the pilot or possible future expansion, it could become apparent that an additional class (or classes) of vulnerable witnesses need an intermediary to help them. The provisions allow sufficient flexibility and are subject to appropriate safeguards, including that any regulation is required to be presented to Parliament and is subject to scrutiny, with Parliament having the right to disallow any regulation.

Clause 44 – Provision for requirements, qualifications, training, experience or skills to be prescribed by regulation in new section 21AZV

New section 21AZV(2) in clause 44 allows certain matters relating to the suitability of a person to perform the functions of an intermediary to be prescribed by regulation. This provision may breach the fundamental legislative principle of having sufficient regard to the institution of Parliament.

Any breach of fundamental legislative principles is justified given that these provisions are intended to ensure appropriate standards are in place for intermediaries who work with vulnerable witnesses, including children. Provision for certain matters to be prescribed by regulation will provide for flexibility but is safeguarded by the fact that any such regulation will be required to be presented to Parliament and subject to scrutiny, with Parliament having the right to disallow any regulation.

Consultation

The recommendations of the Criminal Justice Report were informed by extensive consultation by the Royal Commission, including numerous public hearings and private sessions.

QSAC consulted widely during the formation of the CEM Report. Subsequent feedback from government, legal and non-legal stakeholders was sought on the CEM Report's recommendations after the CEM Report was publicly released.

Consultation with key legal and non-legal stakeholders occurred generally on the recommendations in the Criminal Justice Report between December 2018 and February 2019. Further feedback was invited from stakeholders in April 2019 specifically in relation to recommendations 44-51 relating to reform of tendency and coincidence evidence.

Between 22 August 2019 and 20 September 2019 public consultation was undertaken on a draft of the Bill. Additionally, some consultation forums were conducted with key stakeholders. Feedback received during consultation was taken into account in finalising the Bill.

The Chief Justice, the President of the Childrens Court, the Chief Judge and the Chief Magistrate were consulted during drafting of the Bill and their comments were taken into account in finalising the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another state. However, most other Australian jurisdictions have progressed, or are in the process of implementing, reforms that implement similar recommendations of the Criminal Justice Report and the Commonwealth and South Australian Parliaments have passed legislation dealing with ‘child-like sex dolls’.

In September 2019, the *Criminal Code Act 1995* (Cth) was amended to create an offence relating to the possession of “child-like sex dolls” in addition to other amendments relating to “child-like sex dolls”.

The South Australian Parliament enacted the *Criminal Law Consolidation (Child-Like Sex Dolls Prohibition) Amendment Act 2019* which created offences relating to the production, dissemination and possession of “child-like sex dolls”.

Notes on provisions

Part 1 Preliminary

Clause 1 Short title

Clause 1 states that, when enacted, the Bill will be cited as the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019*.

Clause 2 Commencement

Clause 2 provides that the Act commences on the day after the date of assent, with the exception of the following provisions which are to commence on proclamation:

- part 3 (amendments to the *Childrens Court Act 1992* consequential to the establishment of the intermediary scheme);
- part 5, division 3 (amendments to the Criminal Code consequential to the establishment of the intermediary scheme and creation of new offences of failure to report and failure to protect);
- part 6, division 3 (amendments to the *Criminal Law (Sexual Offences) Act 1978* consequential to the establishment of the intermediary scheme);
- part 7, division 3 (amendment to the *Disability Services Act 2006* consequential to the creation of a new offence of failure to protect in the Criminal Code);
- part 8, division 3 (amendments to the *Evidence Act 1977* relating to the establishment of the intermediary scheme);
- parts 9 and 10 (amendments to the *Justices Act 1886* and *Oaths Act 1867* consequential to the establishment of the intermediary scheme); and
- part 14, division 3 (amendments to the *Working with Children (Risk Management and Screening) Act 2000* consequential to the creation of a new failure to protect offence in the Criminal Code).

Part 2 Amendment of Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004

Clause 3 Act amended

Clause 3 provides that Part 2 amends the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*.

Clause 4 Amendment of sch 1 (Prescribed offences)

Clause 4 subclause (1) amends schedule 1, item 4 to change the title of section 218B from ‘Grooming children under 16’ to ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Subclause (2) amends schedule 1, item 4 to insert the new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (3) amends schedule 1, item 6 to insert the new Criminal Code (Cwlth) offences under section 273A.1 (Possession of child-like sex dolls etc.) and section 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Part 3 Amendment of Childrens Court Act 1992

Clause 5 Act amended

Clause 5 provides that Part 3 amends the *Childrens Court Act 1992*.

Clause 6 Amendment of s 20 (Who may be present at a proceeding)

Clause 6 amends section 20(1) consequential to the amendments in Part 8 of the Bill relating to intermediaries.

Part 4 Amendment of Corrective Services Act 2006

Clause 7 Act amended

Clause 7 provides that Part 4 amends the *Corrective Services Act 2006*.

Clause 8 Amendment of sch 1 (Sexual offences)

Clause 8 amends schedule 1 (Sexual offences) to change the section 218B offence title from ‘Grooming children under 16’ to ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Part 5 Amendment of Criminal Code

Division 1 Preliminary

Clause 9 Code amended

Clause 9 provides that Part 5 amends the Criminal Code.

Division 2 Amendments commencing on day after assent

Clause 10 Amendment of s 1 (Definitions)

Clause 10 inserts into section 1 (Definitions) a reference to the definition for the term ‘*child abuse object*’ at section 207A.

Clause 11 Amendment of s 207A (Definitions for this chapter)

Clause 11 inserts into section 207A (Definitions for this chapter) a new definition for the term ‘*child abuse object*’.

Clause 12 Amendment of s 215 (Carnal knowledge with or of children under 16)

Clause 12 amends section 215 (Carnal knowledge with or of children under 16) to insert a note. The note identifies that new section 745 of the Criminal Code (inserted by clause 21 of the Bill) will be relevant to the application of an offence under section 215 where the offence has been committed or is alleged to have been committed prior to 3 July 1989 (when section 14 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* commenced operation). Section 14 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* omitted the provision of former section 215 that limited the period within which a prosecution for either of the offences firstly defined in the section must be begun.

Clause 13 Replacement of s 218B (Grooming children under 16)

Clause 13 omits section 218B (Grooming children under 16) and inserts a newly cast section 218B (Grooming child under 16 years or parent or carer of child under 16 years).

The new section 218B preserves the previous offence, committed where:

- an adult engages in any conduct in relation to:
 - a child under 16 years; or
 - a person the adult believes to be a child under 16 years; or
 - a fictitious person represented to the adult to be a real child under 16 years;and
- with intent to either facilitate the procurement of a child to engage in a sexual act, either in Queensland or elsewhere or expose, without legitimate reason, the child to any indecent matter, either in Queensland or elsewhere.

Additionally, the newly cast provision expands the application of the offence to conduct by an adult in relation to a person who has the care of the child, or a person who is believed to have care of the child, where the conduct is accompanied by the intent to either facilitate the procurement of a child to engage in a sexual act, either in Queensland or elsewhere; or expose, without legitimate reason, the child to any indecent matter, either in Queensland or elsewhere.

The term ‘*person who has the care of the child*’ is defined to include a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

The maximum penalties that apply to the conduct under the newly cast offence continue to be 5 years imprisonment, or 10 years imprisonment if the child is or is believed to be under 12 years.

Clause 14 Amendment of s 228G (Forfeiture of child exploitation material etc.)

Clause 14 amends the section so that it applies where offences are prosecuted under section 228I (Producing or supplying child abuse object) or section 228J (Possessing child abuse object).

Clause 15 Amendment of s 228H (Possession etc. of child exploitation material by law enforcement officer)

Clause 15 amends the section so that the defence may apply for an offence charged under section 228I (Producing or supplying child abuse object) or section 228J (Possessing child abuse object).

Clause 16 Insertion of new ss 228I-228K

Clause 16 inserts new sections 228I (Producing or supplying child abuse object) and 228J (Possessing child abuse object) which creates new offences of producing or supplying a child abuse object and possessing a child abuse object.

The proposed new offence at section 228I provides a person who produces or supplies a child abuse object commits a crime. The maximum penalty for the offence is 20 years imprisonment if the production or supply is for a commercial purpose, or otherwise 14 years imprisonment. There is a circumstance of aggravation stated at section 161Q (Meaning of serious organised crime circumstance of aggravation) of the PSA for this offence. An indictment charging this offence with the circumstance of aggravation at section 161Q of the PSA may not be presented without the consent of a Crown Law Officer (as defined at section 1 of the Criminal Code).

The proposed new offence at section 228J provides that a person who knowingly possesses a child abuse object commits a crime. The maximum penalty for the offence is 14 years imprisonment. There is a circumstance of aggravation stated at section 161Q (Meaning of serious organised crime circumstance of aggravation) of the PSA for this offence. An indictment charging this offence with the circumstance of aggravation at section 161Q of the PSA may not be presented without the consent of a Crown Law Officer (as defined at section 1 of the Criminal Code).

The clause also inserts section 228K (Defence for ss 228I and 228J) which provides for a defence specific to the new offences created by this clause. It provides that it is a defence for a person charged with an offence under either sections 228I or 228J to prove that the person charged with the offence engaged in conduct alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and the charged person's conduct was in the circumstance reasonable for that purpose.

Clause 17 Amendment of s 229B (Maintaining a sexual relationship with a child)

Clause 17 amends section 229B (Maintaining a sexual relationship with a child) to insert a note. The note identifies that new sections 746 and 747 of the Criminal Code (inserted by clause 21 of the Bill) will be relevant to the application of section 229B in relation to acts done prior to 3 July 1989 and acts done during the period 3 July 1989 to 30 April 2003.

Clause 18 Amendment of s 632 (Corroboration)

Clause 18 inserts a note in section 632(3) referencing provisions relating to the giving of jury directions and warnings in section 4A (Evidence of complaint generally

admissible) of the *Criminal Law (Sexual Offence) Act 1978* and section 132BA (Delay in prosecuting offence) of the *Evidence Act 1977* inserted by the Bill.

Clause 19 Amendment of s 668A (Reference by Attorney-General of pre-trial direction or ruling)

Clause 19 amends the section heading and subsection (1) to replace the references to ‘Attorney-General’ with a reference to the term ‘Crown Law Officer’ (as defined in section 1). This amendment will ensure that both the Attorney-General and the Director of Public Prosecutions can refer to the Court of Appeal for its consideration and opinion a point of law that has arisen in relation to a direction or ruling under section 590AA given by another court as to the conduct of a trial or pre-trial hearing.

Clause 20 Amendment of s 669A (Appeal by Attorney-General)

Clause 20 amends the section heading and subsection (1A) to replace the references to ‘Attorney-General’ with a reference to the term ‘Crown Law Officer’ (as defined in section 1). This will ensure that both the Attorney-General and the Director of Public Prosecution can appeal to the Court of Appeal against an order staying proceedings or further proceedings on an indictment.

Clause 21 Insertion of new pt 9, ch 102, ch div 1.

Clause 21 inserts into Part 9, new Chapter 102 (Transitional and declaratory provisions for *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019*) which contains new sections 744 to 750.

New section 744 (Application of repealed s 212) abolishes the provision of section 212, in existence before 3 July 1989 that limited the period within which a prosecution for the offence defined in the section must be begun. The limitation provision was abolished in relation to post 3 July 1989 conduct by virtue of section 13 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*.

New section 745 (Application of former s 215) abolishes the provision of section 215, in existence before 3 July 1989 that limited the period within which a prosecution for the offence defined in the section must be begun. The limitation provision was abolished in relation to post 3 July 1989 conduct by virtue of section 14 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*.

New section 745(3) provides that the abolition of the immunity from prosecution does not apply to acts committed under section 215 in relation to a girl of 16 years, prior to the commencement of section 19 of the *Criminal Code Amendment Act 1976* (which lowered the threshold age for a victim under former section 215 from under 17 years to under 16 years).

Prior to the enactment of the *Criminal Code Amendment Act 1976*, an offence under section 215 could be committed against a 16 year old girl. Given that this conduct against a 16 year old girl is no longer an offence under current law, section 11 of the Criminal Code prohibits the punishment for this offending. Therefore new section 745 does not retrospectively apply the abolition of the immunity from prosecution acquired

in relation to a pre *Criminal Code Amendment Act 1976* offence under section 215 where the girl was 16 years of age.

In new section 746 (Application of s 229B to acts done before 3 July 1989) subsection (1) retrospectively applies the offence in section 229B (Maintaining a sexual relationship with a child), as in force at commencement, to acts committed prior to 3 July 1989 (when the offence first came into effect by virtue of section 23 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*).

New section 746(2) provides that the existing section 229B applies to pre 3 July 1989 acts subject to the following qualifications:

- the maximum penalties that are to apply are:
 - 7 years imprisonment; or
 - 14 years imprisonment - if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 5 years but less than 14 years; or
 - Life imprisonment - if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 14 years or more; and
- the reference in section 229B(10) to the definition of ‘*offence of a sexual nature*’ to an offence defined in section 210 (other than section 210(1)(e) or (f)), 215, 222, 349, 350 or 352 is taken to include a reference to an offence in force in the Criminal Code before 3 July 1989 and constituted by an act that would, if committed on commencement, also constitute an offence defined in a section mentioned in that definition.

New section 746(3) provides that section 229B does not apply in relation to pre 3 July 1989 conduct if before commencement the conduct was the subject of a charge of an offence, irrespective of whether or not the charge has been finalised.

New section 747 (Application of s 229B during period 3 July 1989 to 30 April 2003) provides that the offence in section 229B, as in force at commencement, applies to acts committed in the period between 3 July 1989 and 30 April 2003.

In relation to the period from 3 July 1989 to 30 June 1997, new section 747(2) provides that the retrospective application of section 229B is subject to the following qualifications:

- the maximum penalties to be applied to offences over this period are:
 - 7 years imprisonment; or
 - 14 years imprisonment - if in the course of the unlawful sexual relationship the offender committed an unlawful sexual act for which the offender is liable to imprisonment for 5 years but less than 14 years; or
 - Life imprisonment - if in the course of the unlawful sexual relationship the offender committed an unlawful sexual act for which the adult is liable to imprisonment for 14 years or more; and
- the reference in section 229B(10) to the definition of ‘*offence of a sexual nature*’ to an offence defined in section 210 (other than section 210(1)(e) or (f)), 215, 222, 349, 350 or 352 is taken to include a reference to an offence in force in the Criminal Code before 1 July 1997 and constituted by an act that would, if committed on

commencement also constitute an offence defined in a section mentioned in that definition.

In relation to the period from 1 July 1997 to 30 April 2003, new section 747(3) provides that the retrospective application of the form of the maintaining offence to the period is subject to the following qualifications:

- the maximum penalties to be applied to offences over this period are:
 - 14 years imprisonment; or
 - Life imprisonment - if in the course of the unlawful sexual relationship the offender committed an unlawful sexual act for which the offender is liable to imprisonment for 14 years or more; and
- the reference in section 229B(10) to the definition of ‘*offence of a sexual nature*’ to an offence defined in section 210 (other than section 210(1)(e) or (f)), 215, 222, 349, 350 or 352 is taken to include a reference to an offence in force in the Criminal Code before 1 May 2003 and constituted by an act that would, if committed on commencement, also constitute an offence defined in a section mentioned in that definition.

New section 747(4) provides that if prior to commencement a person has been charged with an offence against section 229B where the offending period includes any part within the 3 July 1989 to 30 April 2003 period, subsection (1) will not apply to the offence proceedings or to any appeal for the offence.

New section 748 (Proceedings for offences against s 229B) provides that in relation to a charge of maintaining under section 746 (i.e. a charge relating to the period before 3 July 1989) or section 747 (i.e. the period 3 July 1989 to 30 April 2003), a proceeding may be started, and the person may be convicted of and punished for the offence, as if section 229B had always applied in the way provided for under section 746 or 747. Subsection (3) provides that section 748 applies despite section 11 and section 20C of the *Acts Interpretation Act 1954*.

New section 749 (Application of former s 218B to certain conduct) provides that where conduct constituting an offence against former section 218B started before the commencement and continues after the commencement, the former section 218B continues to apply in relation to all of the conduct constituting the offence.

New section 750 (Application of amended ss 668A and 669A) subsection (1) provides that section 668A as amended by the Bill applies in relation to a direction or ruling under section 590AA whether or not the direction or ruling is given before or after commencement. Subsection (2) provides that section 669A as amended by the Bill applies in relation to an order staying proceedings or further proceedings on an indictment whether or not the order is made before or after commencement.

Division 3 Amendments commencing by proclamation

Clause 22 Amendment of s 1(Definitions)

Clause 22 amends section 1 to insert the new definitions of ‘*child sexual offence*’ and ‘*religious confession*’ contained in the following clause.

Clause 23 Amendment of s 207A (Definitions for this chapter)

Clause 23 amends section 207A (Definitions for this chapter) which defines key terms for Chapter 22 (Offences against morality) of the Criminal Code to insert definitions relevant to sections 229BB (Failure to protect child from child sexual offence) and 229BC (Failure to report belief of child sexual offence committed in relation to a child).

Clause 24 Amendment of s 228F (Excluding non-essential persons from court when child exploitation material displayed)

Clause 24 amends section 228F(2) to insert into the definition of an ‘*essential person*’ reference to a person who is an intermediary under the new division 4C for a witness giving evidence. This clause also includes consequential changes arising from the insertion of this new paragraph into the definition.

Clause 25 Insertion of new ss 229BB and 229BC

Clause 25 inserts new sections 229BB and 229BC into the Criminal Code after section 229B.

Section 229BB creates a new offence of failure to protect child from child sexual offence. This new offence is a crime punishable by five years imprisonment.

The offence applies to an ‘*accountable person*’ who is (as defined under subsection 4) an adult who is associated with an institution, other than a regulated volunteer. The term ‘*adult*’ is defined in section 1 of the Criminal Code to mean a person of or above the age of 18 years.

Subsection (4) also defines an ‘*institution*’ to mean an entity, other than an individual, that:

- provides services to children; or
- operates a facility for, or engages in activities with, children under the entity’s care, supervision or control.

An institution may include government and non-government entities, including a government department.

Under subsection (3) an adult is ‘*associated*’ with an institution if the adult:

- owns, or is involved in the management or control of, the institution; or
- is employed or engaged by the institution; or
- works as a volunteer for the institution; or
- engages in an activity in relation to the institution for which a working with children authority under the *Working with Children (Risk Management and Screening) Act 2000* is required; or
- engages in the delivery of a service to a child who is under care, supervision or control of the institution.

A ‘*regulated volunteer*’ is defined in subsection (4) to mean a person who is taken to be a volunteer employed or engaged in regulated employment under sections 4(2), 4(3), 9(2) or 14(2) of schedule 1 of the *Working with Children (Risk Management and*

Screening) Act 2000. Regulated volunteers include the adult household members of family day care residences, homestay providers, home-based stand-alone care services, and foster and kinship carers.

The offence will apply if the following circumstances are met:

- the accountable person knows there is a significant risk that another adult (the ‘*alleged offender*’) will commit a child sex offence in relation to a child;
- the alleged offender is associated with an institution or is a regulated volunteer;
- The child is:
 - under the care, supervision or control of an institution; and
 - either under 16 years or is 16 or 17 years of age with an impairment of the mind;
- the accountable person has the power or responsibility to reduce or remove the risk; and
- the accountable person wilfully or negligently fails to reduce or remove the risk.

New section 229B(2) provides that it does not matter if the knowledge was gained by the accountable person during, or in connection with, a religious confession. The term ‘*religious confession*’ is defined in section 207A (Definitions for this chapter) to mean a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the member’s church or religious denomination.

New section 229BC (Failure to report belief of child sexual offence committed in relation to child) creates a new criminal offence which is a misdemeanour punishable by three years imprisonment that applies to an adult (i.e. a person 18 years or over) where the following circumstances are met:

- the adult gains information that causes them to believe on reasonable grounds, or ought reasonably to cause them to believe, that a child sex offence is being or has been committed by another adult (the alleged offender);
- at the time at which the offence is believed or ought reasonably to be believed to have been committed against the child, the child is under 16 years or is 16 or 17 years of age with an impairment of the mind;
- in the absence of a reasonable excuse, the adult fails to disclose the information to a police officer as soon as reasonably practicable after the belief is, or ought reasonably to have been, formed.

Subsection (3) provides that it does not matter if the information was gained by the adult during, or in connection with, a religious confession. Religious confession is defined in section 207A (Definitions for this chapter) to mean a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the member’s church or religious denomination.

Subsection (4) sets out a non-exhaustive list of reasonable excuses for the purposes of the offence.

Subsection (4)(a) provides that a reasonable excuse exists where the adult believes on reasonable grounds that the information has already been disclosed to a police officer.

Subsection (4)(b) provides that a reasonable excuse exists where the person either has already reported the information, or believes on reasonable grounds that the information was or will be reported by another person under existing reporting obligations in the

Education (General Provisions) Act 2006, Child Protection Act 1999 or Youth Justice Act 1992.

Consistent with the Royal Commission recommendations, subsections (4)(a) and (b) will assist in reducing duplicate reports to police regarding the same information.

Subsection (4)(c) provides that a reasonable excuse exists where the information is gained by the adult after the child has become an adult (the alleged victim) and it is reasonably believed by the adult that received the information that the alleged victim does not want the information disclosed to a police officer.

Subsection (4)(d) excuses liability where a person reasonably believes that disclosure would endanger the safety of themselves or any other person (other than the alleged child sexual abuser).

Subsection (5) provides that an adult who, in good faith, discloses information mentioned in subsection (1)(a) to a police officer is not liable civilly, criminally or under an administrative process for making the disclosure.

Clause 26 Amendment of s 552B (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial)

Clause 26 amends section 552B(1) to insert a new paragraph referencing the new section 229BB offence inserted by clause 25 and make related consequential amendments. This will ensure that the offence in section 229BB will be subject to summary disposition unless the defendant elects to proceed by jury trial.

Clause 27 Amendment of s 590AA (Pre-trial directions and rulings)

Clause 27 amends section 590AA(2)(1) to replace the reference to ‘division 4A’ of the *Evidence Act 1977* with a reference to division 4 (Evidence of special witnesses), division 4A (Evidence of affected children) and new division 4C (Intermediaries) of the *Evidence Act 1977* inserted by the Bill.

Clause 28 Insertion of new pt 9, ch 102, ch div 2

Clause 28 inserts new chapter division 2 (Provision commencing by proclamation) in Part 9, Chapter 102 containing a transitional provision.

New section 751 (Application of s 229BC) in chapter division 2 provides that the new offence under section 229BC of the Criminal Code (Failure to report belief of child sexual offence committed in relation to child) applies to an adult in relation to information gained on or after commencement irrespective of whether the information relates to an alleged offence believed to have been committed by an alleged offender before or after the commencement.

Part 6 Amendment of Criminal Law (Sexual Offences) Act 1978

Division 1 Preliminary

Clause 29 Act amended

Clause 29 provides that Part 6 amends the *Criminal Law (Sexual Offences) Act 1978*.

Division 2 Amendment commencing on day after assent

Clause 30 Amendment of s 4A (Evidence of complaint generally admissible)

Clause 30 inserts a note into section 4A(5) referencing provisions relating to the giving of jury directions and warnings in section 632 (Corroboration) of the Criminal Code and new section 132BA (Delay in prosecuting offence) of the *Evidence Act 1977* inserted by the Bill.

Division 3 Amendment commencing by proclamation

Clause 31 Amendment of s 5 (Exclusion of public)

Clause 31 amends section 5(1) consequential to amendments in the Bill to insert new division 4C (Intermediaries) of the *Evidence Act 1977*. The amendment will include an intermediary in the list of persons other than whom the court shall cause to be excluded whilst a complainant is giving evidence and includes consequential renumbering arising from this change.

Part 7 Amendment of Disability Services Act 2006

Division 1 Preliminary

Clause 32 Act amended

Clause 32 provides that Part 7 amends the *Disability Services Act 2006*.

Division 2 Amendments commencing on day after assent

Clause 33 Amendment of sch 2 (Current serious offences)

Clause 33 subclause (1) amends schedule 2 (Current serious offences), item 4 to change the offence title of section 218B from ‘Grooming children under 16’ to ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Subclause (2) amends schedule 2, item 4 to insert new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (3) amends schedule 2, item 6 to insert new Criminal Code (Cwlth) offences under section 273A.1 (Possession of child-like sex dolls etc.), 273B.4 (Failing to protect

child at risk of child sexual abuse offence) and 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Clause 34 Amendment of sch 3 (Repealed or expired serious offences)

Clause 34 amends schedule 3, item 1 (Repealed or expired serious offences) to insert the pre-commencement offence under section 218B (Grooming children under 16 years) as was in force from time to time before its repeal by the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019*.

Clause 35 Amendment of sch 4 (Current disqualifying offences)

Clause 35 subclause (1) amends schedule 4, item 4 to insert the new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (2) amends schedule 4, item 5 to insert new Criminal Code (Cwlth) offences under sections 273A.1 (Possession of child-like sex dolls etc.) and 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Clause 36 Amendment of sch 5 (Repealed or expired disqualifying offences)

Clause 36 amends schedule 5, item 1 (Repealed or expired disqualifying offences) to insert the pre-commencement offence of section 218B (Grooming children under 16) as was in force from time to time before its repeal by the *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019*.

Division 3 Amendments commencing by proclamation

Clause 37 Amendment of sch 2 (Current serious offences)

Clause 37 amends schedule 2, item 4, to insert the new Criminal Code offence in section 229BB (Failure to protect child from child sexual offence) of the Criminal Code.

Part 8 Amendment of Evidence Act 1977

Division 1 Preliminary

Clause 38 Act amended

Clause 38 provides that Part 8 amends the *Evidence Act 1977*.

Division 2 Amendments commencing on day after assent

Clause 39 Insertion of new s 132BA

Clause 39 inserts a new section 132BA.

Section 132BA (Delay in prosecuting offence) applies in relation to a criminal proceeding, if the judge, on the judge's own initiative, or on the application of a party

to the proceeding, is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence. The judge must inform the jury of the nature of the disadvantage and the need to take the disadvantage into account when considering the evidence. A significant forensic disadvantage is not established by the mere fact of delay in prosecuting the offence. Subsection (7) provides that ‘*delay*’ in prosecuting an offence, includes delay in reporting the offence. The judge need not comply with section 132BA if there are good reasons for doing so and the judge must not warn or suggest to the jury that it would be “dangerous or unsafe to convict” or “the complainant’s evidence should be scrutinised with great care”.

Clause 40 Insertion of new pt 9, div 10

Clause 40 inserts a new part 9, Division 10 (Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019) containing a transitional provision.

New section 154 (Application of s132BA) provides section 132BA applies in relation to a criminal proceeding only if the trial of the proceeding starts on or after the commencement. Subsection (2) provides that the trial of a criminal proceeding starts when, under section 36 of the *Jury Act 1995*, a jury panel attends before the court in which the trial is to be conducted. It does not matter whether the offence the subject of the criminal proceeding was committed before or after the commencement.

Division 3 Amendments commencing by proclamation

Clause 41 Amendment of s 14B (Other definitions for division)

Clause 41 inserts into the definition of ‘*essential person*’ a new paragraph to include a reference to an intermediary under division 4C for a witness giving evidence.

Clause 42 Amendment of s 21A (Evidence of special witnesses)

Clause 42 amends section 21A to insert new subsection (5AA) which provides that an order must not be made under subsection (2)(a) or (b) or (5) excluding an intermediary under division 4C for the witness from the room in which a special witness is giving evidence.

Clause 43 Amendment of s 21AU (Exclusion of public)

Clause 43 amends the definition of ‘*essential person*’ in section 21AU(4) to add an intermediary under division 4C for the child and includes consequential renumbering arising from this change.

Clause 44 Insertion of new pt 2, div 4C

Clause 44 inserts new Division 4C (Intermediaries) into Part 2 (Witnesses).

Subdivision 1 (Preliminary) contains new sections 21AZI to 21AZK.

New section 21AZI contains definitions for Division 4C.

New section 21AZJ defines the term ‘*relevant proceeding*’ as a criminal proceeding for a child sexual offence and is held before a court at a place prescribed by regulation. This provision will allow the intermediary scheme to be piloted in a court at prescribed places.

‘*Child sexual offence*’ is defined in section 21AZJ(3) to mean an offence of a sexual nature committed in relation to a child, including, for example, an offence against a provision of the Criminal Code, chapter 22 or 32.

New section 21AZK provides for references to particular matters in Division 4C, including providing that a reference in a provision of the new division to the giving of evidence by a witness includes a reference to the giving of evidence in a way provided for under section 21A (for special witnesses); and the taking of the witness’s evidence in a way provided for under division 4A (for affected child witnesses). This ensures that a witness for whom an intermediary may be appointed may also be a special witness or an affected child witness.

Subdivision 2 (Appointment and functions) contains new sections 21AZL to 21AZN.

New section 21AZL sets out the process for appointment of an intermediary. The section applies to prosecution witnesses who are either children under 16 years, persons with an impairment of the mind, persons who have difficulty communicating or other witnesses of a class prescribed by regulation. This section allows the court to make an order, at any stage of the proceeding, appointing a person as an intermediary for the witness, on the court’s own initiative or on application of a party. This section limits persons who may be appointed as an intermediary to those included on the intermediaries panel and excludes particular persons from appointment (such as relatives, friends or acquaintances of the witness or of the defendant in the relevant proceeding). The section also allows a witness to give evidence without the help of an intermediary if they so wish, if the court is satisfied the witness is aware an application can be made appointing an intermediary and it would not be in the interests of justice to make the order. Given the application of section 25(1)(b)(i) of the *Acts Interpretation Act 1954*, the court also has the power to remove or suspend an intermediary it has appointed.

New section 21AZM outlines functions of an intermediary. The functions in relation to the witness’s evidence in the proceeding relate to communication to and from the witness. Subsection (3) provides that, in performing these functions, an intermediary is an officer of the court and must act impartially. Section 21AZM also provides that an intermediary has the functions conferred in subdivision 3 in relation to directions hearings, including informing the court of the communication needs of the witness.

New section 21AZN provides that an intermediary for a witness must not perform a function under section 21AZM(1) unless the intermediary has taken an oath under section 30A of the *Oaths Act 1867*, as inserted by the Bill.

Subdivision 3 (Directions hearings) contains new sections 21AZO to 21AZS.

New section 21AZO provides that the subdivision applies if an intermediary is appointed for a witness in a relevant proceeding.

New section 21AZP provides that the court must, on making the order appointing an intermediary, give a direction that a hearing be held in relation to the giving of evidence by the witness. The court can, with consent of the parties, hold this directions hearing immediately after making the order appointing the intermediary. This section also allows the court to give a direction that a further directions hearing be held in relation to the giving of evidence by the witness at any stage of the proceeding. In giving a direction, the court may, if it considers appropriate, direct the intermediary to prepare a written report for the court that states the communication needs of the witness and the intermediary's recommendations about the most effective way to communicate with the witness. The court may direct that a stated person attend the hearing.

New section 21AZQ provides that particular persons must attend the directions hearing. The witness may attend the directions hearing, but is not required to, subject to any direction of the court.

New section 21AZR sets out functions of an intermediary at the directions hearing. The intermediary must inform the court of the communication needs of the witness and recommend to the court the most effective way to communicate with the witness. This information may be given, and any recommendation may be made, in the way the court considers appropriate, including, for example, in a report prepared in compliance with a direction under section 21AZP or in a report prepared by the intermediary before the intermediary was appointed for the witness.

New section 21AZS provides that a direction may be given about a range of matters, including for example: the manner of questioning the witness; and the duration of questioning the witness.

Subdivision 4 (Giving of evidence and jury instructions) contains new sections 21AZT and 21AZU.

New section 21AZT provides that if a person is appointed as an intermediary for a witness in a relevant proceeding, the evidence of the witness must be given in the presence of the intermediary or in compliance with a direction that provides for the use of an audio-visual link or other communication facility.

New section 21AZU provides that the judge presiding must instruct the jury about certain matters unless satisfied this would not be in the interests of justice.

Subdivision 5 (Intermediaries panel) contains new sections 21AZV to 21AZY.

New section 21AZV allows the chief executive to establish a panel of persons the chief executive is satisfied are suitable to perform the functions of an intermediary. While not limiting the matters to which the chief executive may have regard in considering the suitability of a person, subsection (2) provides that a person is not suitable to perform the functions of an intermediary unless they meet specified criteria, including holding a tertiary qualification in occupational therapy, psychology, social work or speech pathology or other qualifications, training, experience or skills prescribed by regulation.

Section 21AZW provides for removal of a person from the intermediaries panel if the chief executive decided the person is no longer suitable to perform the functions of an intermediary. If the intermediary is removed from the panel, the chief executive must give the person written notice stating the reasons for the decision.

New section 21AZX provides that the chief executive may ask the police commissioner for a person's criminal history (including a brief description of the circumstances of a conviction mentioned in the criminal history) in deciding the suitability of a person to perform the functions of an intermediary under new section 21AZV (Chief executive to establish intermediaries panel) or 21AZW (Removal of person from intermediaries panel). However, the chief executive may make the request only if the person has given the chief executive written consent for the request.

New section 21AZY provides for the confidentiality of criminal history information and creates a new offence, carrying a maximum penalty of 100 penalty units, relating to disclosure of criminal history information that is not permitted under the section.

Clause 45 Amendment of s 21M (Meaning of *protected witness*)

Clause 45 amends section 21M to add the new offences under section 229BB (Failure to protect child from child sexual offence) and section 229BC (Failure to report belief of offence of sexual nature committed in relation to child) of the Criminal Code created by the Bill to the offences listed in section 21M(3) as '*prescribed offence*'.

Clause 46 Insertion of new s 155

Clause 46 inserts new section 155 which provides that part 2 division 4C applies to proceedings, whether the proceeding was started before or after commencement.

Clause 47 Amendment of sch 3 (Dictionary)

Clause 47 amends the Dictionary in schedule 3 of the Act to replace the existing definition of *relevant proceeding* and insert new key terms for the new part 2, division 4C (Intermediaries).

Part 9 Amendment of Justices Act 1886

Clause 48 Act amended

Clause 48 provides that Part 9 amends the *Justices Act 1886*.

Clause 49 Amendment of s 83A (Direction hearing)

Clause 49 amends section 83A to include reference to new division 4C (Intermediaries) of the *Evidence Act 1977* inserted by the Bill and division 4 (Evidence of special witnesses). The amendments also include consequential renumbering.

Part 10 Amendment of Oaths Act 1867

Clause 50 Act amended

Clause 50 provides that Part 10 amends the *Oaths Act 1867*.

Clause 51 Insertion of new s 30A

Clause 51 inserts a new section for intermediaries consequential to the amendments in new division 4C (Intermediaries). The oath for an intermediary provided in this section is modelled on a similar provision for oaths and affirmations given by intermediaries in Victoria under the *Criminal Procedure Act 2009* and *Criminal Procedure Regulations 2009*.

Section 17 of the Act provides for the intermediary to take an affirmation instead of an oath under this new section 30A.

Part 11 Amendment of Penalties and Sentences Act 1992

Clause 52 Act amended

Clause 52 provides that Part 11 amends the *Penalties and Sentences Act 1992*.

Clause 53 Amendment of s 9 (Sentencing guidelines)

Clause 53 amends section 9 (Sentencing guidelines).

Subclause (1) omits section 9(4)(a) to (c) and inserts new section 9(4)(a) to (c) to provide, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years or a child exploitation material offence, that:

- the court must have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed, rather than when the offence was committed; and
- the principles mentioned in section 9(2)(a) that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable, do not apply; and
- the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

Subclause (2) amends section 9(5) to correct reference to section 9(4)(b) to section 9(4)(c).

Subclause (3) amends section 9(6) to insert any relationship between the offender and the child as a further factor to which the court must have primary regard when sentencing an offender.

Subclause (4) renumbers the subparagraphs in section 9(6) to account for the insertion of a further subparagraph above (in subclause (3)).

Subclause (5) inserts new subsection (6A) to provide that for subsection (6)(h), the court must not have regard to the good character of an offender to whom subsection (4) applies if the character of the offender assisted the offender in committing the offence.

Subclause (6) includes a reference to a child exploitation material offence.

Subclause (7) inserts new subsections 9(7)(a), (aa), (ab) and (ac) to provide for further matters a court must take into account when sentencing an offender for an offence set out in new subsection (12) (see subclause 9).

Subclause (8) inserts new subsection 9(7AA) that applies the prohibition of reliance on good character as a mitigating factor in the sentencing of offenders for the offences set out in new subsection (12) as well as offences of a sexual nature committed in relation to a child under 16 years.

Subclause (9) inserts a definition of child exploitation material offence.

Clause 54 Insertion of new s 195E

Clause 54 creates a power for a court to order that a medical or other report tendered at sentence be provided to the corrective service department. The order may specify times within which the report is to be provided and any other requirements to give effect to the order.

Clause 55 Insertion of new pt 14, div 21

Clause 55 inserts a new Part 14, Division 21 which contains transitional provisions relating to the Bill.

New section 256 (Sentencing guidelines) provides that section 9, as amended applies to the sentencing of an offender after the commencement whether or not the offence or conviction happened before or after commencement.

New section 257 provides that an order under new section 195E applies to a court sentencing an offender after the commencement whether the offence occurred before or after the commencement and if the sentence is imposed on appeal or under a reopening of proceedings under section 188.

Clause 56 Amendment of sch 1C (Prescribed offences)

Clause 56 amends schedule 1C (Prescribed offences).

Subclause (1) inserts new Criminal Code offences:

- section 228I (Producing or supplying child abuse object); and
- section 228J (Possessing child abuse object).

Subclause (2) omits the offence title for section 218B (Grooming children under 16) of the Criminal Code and substitutes it with the new offence title of ‘Grooming child under 16 or parent or carer of child under 16 years’.

Part 12 Amendment of Police Powers and Responsibilities Act 2000

Clause 57 Act amended

Clause 57 provides that Part 12 amends the *Police Powers and Responsibilities Act 2000*.

Clause 58 Amendment of s 789A (Power to demand production of employment-screening document)

Clause 58 amends section 789A of the Act to enable a police officer to require a person who has been charged with a ‘*serious offence*’ as defined under the *Working with Children (Risk Management and Screening) Act 2000* to give the police officer an employment-screening document. This will complement the existing ability under section 789A to require a person who has been charged with a disqualifying offence to give a police officer an employment-screening document.

Clause 59 Amendment of sch 2 (Relevant offences for controlled operations and surveillance device warrants)

Clause 59 amends schedule 2, item 4 to omit the offence title for Criminal Code section 218B (Grooming children under 16) and substitutes the new offence title of ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Part 13 Amendment of Transport Operations (Passenger Transport) Act 1994

Clause 60 Act amended

Clause 60 provides that Part 13 amends the *Transport Operations (Passenger Transport) Act 1994*.

Clause 61 Amendment of sch 1A (Driver disqualifying offences)

Clause 61 subclause (1) amends schedule 1A, part 1, division 1 to insert the new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (2) amends schedule 1A, part 1, division 1, item 7A to replace the reference to section 218B (Grooming children under 16) of the Criminal Code with the new offence title of ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Subclause (3) amends schedule 1A, part 1 to insert new Division 3B (Provision of the Criminal Code repealed by the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2019), containing section 218B (Grooming children under 16) at item 1.

Subclause (4) amends schedule 1A, part 1, division 4 to insert the new Criminal Code (Cwlth) offences under section 273A.1 (Possession of child-like sex dolls etc.) and section 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Part 14 Amendment of Working with Children (Risk Management and Screening) Act 2000

Division 1 Preliminary

Clause 62 Act amended

Clause 62 provides that Part 14 amends the *Working with Children (Risk Management and Screening) Act 2000*.

Division 2 Amendments commencing on day after assent

Clause 63 Amendment of sch 2 (Current serious offences)

Clause 63 subclause (1) amends schedule 2, item 4, entry for 218B, to omit the offence title for Criminal Code section 218B (Grooming children under 16) and substitutes the new offence title of ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Subclause (2) amends schedule 2, item 4 to add the new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (3) amends schedule 2, item 6 to insert the new Criminal Code (Cwlth) offences under section 273A.1 (Possession of child-like sex dolls etc.), 273B.4 (Failing to protect child at risk of child sexual abuse offence) and section 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Clause 64 Amendment of sch 3 (Repealed or expired serious offences)

Clause 64 amends schedule 3, item 1 (Repealed or expired serious offences) to insert the pre-commencement offence under section 218B (Grooming children under 16) as was in force from time to time before the amendments made by the Bill.

Clause 65 Amendment of sch 4 (Current disqualifying offences)

Clause 65 subclause (1) amends schedule 4, item 4 to omit the offence title for section 218B (Grooming children under 16) of the Criminal Code and substitute it with the new offence title of ‘Grooming child under 16 years or parent or carer of child under 16 years’.

Subclause (2) amends schedule 4, item 4 to insert the new Criminal Code offences under section 228I (Producing or supplying child abuse object) and section 228J (Possessing child abuse object).

Subclause (3) amends schedule 4, item 5 to insert new Criminal Code (Cwlth) offences under section 273A.1 (Possession of child-like sex dolls etc.) and section 474.22A (Possessing or controlling child abuse material obtained or accessed using a carriage service).

Clause 66 Amendment of sch 5 (Repealed or expired disqualifying offences)

Clause 66 amends schedule 5, item 1 to insert the pre-commencement offence under section 218B (Grooming children under 16) as was in force from time to time before the amendments made by the Bill.

Division 3 Amendments commencing by proclamation

Clause 67 Amendment sch 2 (Current serious offences)

Clause 67 amends schedule 2, item 4 to insert the new offence in section 229BB (Failure to protect child from child sexual offence) of the Criminal Code.

Part 15 Amendment of Youth Justice Act 1992

Division 1 Preliminary

Clause 68 Act amended

Clause 68 provides that Part 15 amends the *Youth Justice Act 1992*.

Clause 69 Insertion of new s 153B

Clause 69 creates a power for a court sentencing a child to order that a medical or other report tendered at sentence be provided to the department. The order may specify times within which the report is to be provided and any other requirements to give effect to the order.

Clause 70 Amendment of s 160 (Copy of court order or decision to be given to child, parent etc)

Clause 70 amends s 160 (Copy of court order of decision to be given to child, parent etc.) to include an order made under section 153B.

Clause 71 Amendment of s 284 (Definitions for pt 9)

Clause 71 amends section 284 (Definitions for pt 9) to include within the definition of ‘*confidential information*’ material tendered at a sentence.